**Appeals Court No. 2014-P-1936**

EVENTMONITOR INC. AND SHELDON CHANG
APPELLANTS,

v.

ANTHONY LENESS
APPELLEE

APPEAL OF SUPERIOR COURT'S FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FROM JUDGMENT AND JUDGMENT ON FINDING OF THE COURT IN FAVOR OF APPELEES AFTER A JURY-WAIVED TRIAL IN SUFFOLK SUPERIOR COURT

**APPELLANTS' BRIEF**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Judicial Court Rule 1:21, Eventmonitor Inc. and Sheldon Chang state that it is a privately held corporation and no publicly traded company owns more than ten percent of it.

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court erred in finding that "defalcation" as used in Anthony Leness' Employment Agreement only applied to money or its equivalent and not to Anthony Leness' intentional, secret and unauthorized taking of EventMonitor, Inc.'s information assets.
2. Whether the Trial Court erred in finding that Anthony Leness' breach of his Employment Agreement was not a material breach that relieved EventMonitor, Inc. of its obligation to pay him severance.

## STATEMENT OF THE CASE

On April 30, 2008, EventMonitor, Inc. ("EM")filed its Complaint against Anthony Leness ("Leness")alleging Breach of Contract (Count I), Breach of Covenant of Good Faith and Fair Dealing (Count II), Conversion (Count III), Breach of Fiduciary Duty (Count IV), Violation of 93A (Count V), Misrepresentation (Count VI), Declaratory Relief(Count VII), Negligence(Count VIII) and Declaratory Relief with Respect to Indemnity(Count IX). EM's claims arose out of Leness' failure to

perform his duties as an officer and employee of EM under his Employment Agreement and his defalcation of EM's company assets prior to his departure. On May 21, 2008, Leness filed his Answer and Counterclaim. Leness' counterclaims arose, primarily, out of his claim that he was entitled to severance pay and indemnification under his Employment Agreement.

On June 9, 2008, Leness filed his Restated Answer, First Amended Verified Counterclaim and Jury Demand asserting twelve (12) counterclaims. On June 25, 2008, EM filed its Answer to the Counterclaims.

On October 9, 2008, EM filed its motion to dismiss Counts II through X of Leness' counterclaims. On April 22, 2009, the Court denied EM's motion to dismiss.

On January 3, 2011, Leness filed a motion for partial summary judgment with respect to Counts V (Violation of c.93A) and Count IX (Declaratory Relief with Respect to Indemnity) of EM's complaint and for summary judgment on Count III (Conversion) of Leness' Counterclaim. On January 3, 2011, EM filed its opposition to Leness' motion for summary judgment. On May 4, 2011, the Court denied Leness' motion for

summary judgment except as to Count V (Violation of c.93A).

The jury waived trial was conducted for five (5) days from August 6, 2012 through August 10, 2012 before the Honorable Judge Locke. On September 19, 2012, the Court, (Locke,J) issued its Memorandum of Decision and Order For Judgment After Jury-Waived Trial and Order For Judgment. On September 19, 2012, Judgment entered in favor of Leness on EM's claims of breach of contract (Count I), breach of covenant of good faith and fair dealing (Count II) and breach of fiduciary duty (Count IV) and all other counts were dismissed. Judgment also entered in favor of Leness on his counterclaims for breach of contract (Count I), breach of covenant of good faith and fair dealing (Count III) and violation of G.L. c.149, section 48 (Count XII) and all other counterclaims were dismissed.

On October 16, 2012, Leness filed a motion to alter or amend judgment and motion for additional findings of fact. On December 17, 2012, the Court entered an Amended Judgment. On January 31, 2013, EM filed a timely notice of appeal. On February 11, 2013, Leness filed a notice of cross-appeal.

## STATEMENT OF FACTS

Sheldon Chang ("Chang") incorporated EM in Delaware in March of 2000. A.320 From March of 2000 until June of 2000, EM operated out of Chang's home. A.320 Chang formulated the concept of EM based on his extensive academic experience in quantitative analysis and several years of securities trading and money management experience. A.320-321 Chang developed the original software program, with the assistance of his classmate, Professor Thomas Hales, that eventually became EM's products. A.320 Chang is the President and CEO of EM. A.818

EM developed software products to enable investment management and trading firms to sift through large amounts of real-time and historical information in a meaningful way and to look at the impact of certain events on securities valuation.

A.325-327 Chang wrote EM's first business plan.

A.320-322 EM's first business plan provided the blueprint for the technology, the business direction of EM, the product focus, the business model and the target market. A.320-322

EM utilized its proprietary technology to develop customizable systems to serve financial institutions.

A.325-327 As such, it was very important to EM to maintain the confidentiality of its business information. A.341-350. EM considered confidential information to be critical and implemented numerous protocols to maintain the confidentiality of it business information. A.342 The policy at EM was that anything that is not in the public domain is confidential. A.342 EM wanted to ensure that information related to clients, technology and development remained confidential and proprietary. A.342-343 EM also ensured that its own information, such as system designs, financial information, marketing information and client targeting remained confidential. A.359-364

Every employee at EM was required to sign a proprietary information agreement that required them to protect confidential information and return it to EM once their employment ended. A.343,348-349,358 It was a condition of employment at EM to sign a non-disclosure and confidentiality agreement before starting to work at EM. A.350 EM considered its business, technical and financial information, .such as information related to customers, investors, vendors and business partners, to be EM's confidential and

proprietary information. A.344;A.53 EM considered its contracts with customers and the financial terms of those contracts as confidential business property of EM and treated that information as confidential. A.53

EM considered it critical for its employees to keep proprietary information confidential. A.345 EM even provided its customers with nicknames to keep the customers identities confidential. A.345-347. Every EM customer, since EM's inception, received a nickname to protect its identity. A.347-348

In September of 2000, EM gave Leness the opportunity to work at EM while Leness was an MBA student at Harvard Business School. A.330-332 In late September 2000, Leness started working at EM for one afternoon per week as a student intern for a Harvard Business School course in technology management. A.331-332 In that capacity, Leness was tasked to expand the original business plan, especially the market research. A.332-334 During the spring term of 2001, Leness and four of his classmates participated in a "field study" project, as their course work at Harvard required. A.334-335

On June 11, 2001, EM hired Leness pursuant to a written Employment Agreement. A.336 Leness also became a member of EM's board and an officer and shareholder of EM. A.337-339

Pursuant to Section 1(a) of the Employment Agreement, Leness was hired as the "Vice President of Business Development." A.49 As the Vice President of Business Development, Leness agreed "to undertake the duties and responsibilities inherent in such position and such other duties and responsibilities as the Company's...President shall from time to time reasonably assign to him that are commensurate with his title." A.49 Also, pursuant to the Employment Agreement, Leness "shall report to the...President." A.49

Pursuant to Section 5(b) (i) of the Employment Agreement, Leness could be terminated from EM for "Cause." A.51 "Cause" was defined several ways in section 5(b)(i). A.51 Section 5(b)(i) defined "Cause" as "(i) the finding by the majority of the Board that the Employee engaged in willful fraud or defalcation, either of which involved funds or other assets of the Company." A.51

Pursuant to Section 5(b) of the Employment Agreement, "[a]fter the date of termination for Cause,

*the Company shall have no further obligation or* liability to the Employee relating to this Agreement, the Employee's employment hereunder, or the termination thereof, other than for the following: The

- salary, benefits, and vacation described in this Agreement through the termination date, including accrued vacation time earned but unpaid through the
- date of termination..." A.51

Pursuant to Section 6(b) of the Employment

- Agreement, Leness agreed that "all other business, technical and financial information (including, without limitation, the identity of and information
- relating to customers, investors, vendors, business partners or employees of the Company) he develops, learns or obtains during the term of his employment
- that relate to the Company or the business or demonstrably anticipated business of the Company or
- that are received by or for the Company in confidence, constitute 'Proprietary Information.'" A.53

Section 6(b) also states that Leness "will hold

- in confidence and not knowingly disclose or, except within the scope of his employment, knowingly use any Proprietary Information." A.53

Section 6(b) also states that "[u]pon termination of the Employee's employment, he shall promptly return to the Company all items containing or embodying Proprietary Information (including all copies)..." A.53

Leness, *as* Vice President of *Business* Development, was intimately involved in customer activity at EM. A.804

Magnetar Capital LLC ("Magnetar"), Seneca Capital Advisors, LLC ("Seneca") and Trafelet & Company, LLC ("Trafelet") were customers of EM. A.374-376 Even prior to this litigation, Magnetar, Seneca and Trafelet were referred to through the use of pseudonyms. Magnetar was called "Polaris"; Seneca was called "Goose"; and Trafelet was called "Truffles." A.345-346 EM used pseudonyms to protect the identities of its customers as it was critical to EM's business to maintain its customers' confidence and to be able to assure its customers that their business information would remain confidential. A.346-348 EM took serious precautions to prevent the disclosure of its customers' information to third parties. A.346-350

In the fourth quarter of 2007, Leness asked Chang for permission to explore an idea for a restructuring

of EM's business. A.439-442 Leness inquired about possibly developing a "spin-off" transaction ("SpinCo proposal"). A.439-446 Leness promised that he could come up with a plan that would be a "sweet deal" to EM. A.442

Leness took this assignment in an unapproved direction. A.446-468 In Leness' SpinCo proposal, SpinCo would be allowed to use EM's intellectual property for free and EM's cash and customers (along with the cash flow associated with all of EM's customers except one) would be transferred to SpinCo. A.446-468 The proposal would have left EM with only one customer that generated approximately $35,000 per year in revenue to EM. A.463 EM would then be financed almost solely through loans from SpinCo to EM for up to a year. A.446-468, A.248-252 In essence, the SpinCo proposal transferred almost all of EM's valuable assets to SpinCo without compensation to EM. A.446-468

Leness presented the SpinCo proposal to Chang on October 17, 2007. A.446 The proposal simply made no economic sense to EM. A.446 The amount of time Leness took to develop and propose the concept, and the scarcity of details on SpinCo's capital structure

in the proposal, made Change very suspicious of the deal's real structure and its intent. A.446-468 Chang concluded that the proposal was not a "sweet deal" for EM and actually would have harmed EM. A.469

EM subsequently learned, during discovery in this matter, that on October 16, 2007--the day before Leness presented the SpinCo proposal to Chang-- Leness received an email from his college friend, and EM shareholder, Seth Brennan with the subject line of "so .how'd it go?" A.253 Leness believed that Brennan's subject line referred to Leness' presentation of the SpinCo proposal to Chang. A.796-797

Seth Brennan's October 16, 2007 email was sent to Leness at his EM email account at tony@eventmonitor.com. A.253

Despite receiving the email at his EM email address, Leness replied to Seth Brennan's email using his personal email account at tleness@gmail.com. A.253 In his response to Seth Brennan inquiry, Leness used the Latin phrase "alia iacta est." A.253 When Seth Brennan responded that he did not understand the Latin phrase, Leness responded (again from his personal email account) as follows:

"The die is cast." It was what Caesar said when he crossed the rubicon into rome. A.253

Leness understood that when Caesar crossed the Rubicon into Rome that he was going to war. A.797

EM also learned through discovery in this case (and after Leness was terminated without cause) that, on the same day that Leness presented his SpinCo proposal to Chang (October 17, 2007), Leness created an account with Carbonite using his personal email address. A.266; A.359; A.541-542

Carbonite is an online back-up and storage website. A.266; A.785 Leness initially opened a free trial membership of Carbonite and installed the Carbonite software on EM's laptop that he used, uploaded the entire EM directory on the laptop to the Carbonite site and synchronized the changes after the initial upload. A.766-786; A.785-786 Before the one-month free trial period ended, Leness purchased a one-year subscription to Carbonite. A.786 EM, prior to hiring a forensic computer expert after Leness' termination, had no idea that Leness had signed-up for

the Carbonite site and copied the entire set of EM information in the laptop. A.542

EM has, at least, two back-up facilities that it has been using for many years. A.495-496 One back-up facility is called Grand Central on its internal network and the other consists of several portable disc drives. A.495-496

Leness purchased his one-year subscription to Carbonite on October 28, 2007. A.785 Leness paid for his one-year subscription to Carbonite using his personal credit card and through his personal email account. A.785; A.541

On December 6, 2007, EM terminated Leness without cause pursuant to the Employment Agreement because, among other things, EM felt that Leness' loyalties and interests were not with EM as his SpinCo proposal demonstrated. A.473-474

Once EM terminated Leness and rejected his SpinCo proposal, Leness tried to put pressure on EM, through mobilizing some EM investors who were friends to press the issue. A.272-276 Leness, as was subsequently discovered, began secretly conferring with those persons through channels outside the usual EM means of

communication, including stockholders with which the company previously had had good dealings. A.272-276

After Leness' termination, Ben Levin ("Levin"), Chang and Leness met to discuss the future of EM in light of Leness' termination. A.272-276

On Sunday, December 9, 2007, from his personal email account at tleness@gmail.com, Leness sent his redlined changes to an email that was eventually to be sent to Chang and Leness purportedly only from Levin to summarize the recent meeting among Levin, Chang and Leness. A.272-276 Levin is *a* friend of Leness and an EM shareholder. A.272-276 In the email to Chang and Leness, Levin states, in part, that "I feel it is appropriate to summarize what I heard from you both as the existing options for the business going forward along with some of my thoughts." (emphasis added). A.272-276

Nowhere in Levin's email to Leness and Chang does Levin reveal to Chang that Leness made redline changes to the email before it was sent to Leness and Chang. A.272-276 Leness never informed Chang that he made redline changes to the email before it was sent to Leness and Chang. A.784-785 Levin gave Leness--and his college friend and current business partner Seth

Brennan--the opportunity to make redline changes to the email before it was sent to Chang and Leness but he did not give Chang the same opportunity. A.782-785

Because Leness was entitled to thirty days notice, he continued in the employ of EM for the remainder of 2007 and into the first week of 2008. A.474-475 During the time period between his notice of termination and his last day of work in early January of 2008, EM worked diligently to obtain from Leness all of EM's proprietary information. A.477-485

Chang, on behalf of EM, corresponded with Leness regularly to make sure that Leness returned all of EM's proprietary information promptly and to make Leness aware of the exact protocol that EM required Leness to use to insure all of EM's proprietary information was returned to EM. A.477-485 As part of EM's protocol to obtain all of EM's proprietary information from Leness, EM sent an information request list to Leness on December 28, 2007. A.477-485; A.254

Section VIII of the information request list is entitled "Other Company Information." A.256 Section VIII, part 5, requests a "[luist of all sites where

you have company information including your User ID and password..." A.256

On January 3, 2008, Leness sent an email to Chang at EM stating that he "completed the final sections of the Request List..." A.268 Part of the final sections that Leness completed and provided to Chang on January 3, 2008 was Section VIII, part 5. A.793

Leness made redline additions to Section VIII, part 5 in response to EM's request for "all sites where you have company information..." A.268; A.598 Leness did not list the Carbonite site in Section VIII, part 5. A.268; A.598

In connection with completing Section VIII, part 5, Leness provided EM with a document entitled "EventMonitor Passwords." A.258 Leness did not provide the password for, or even mention, Carbonite on the "EventMonitor Passwords" document. A.258

Leness returned the EM laptop that he had been using for work to EM on January 5, 2008 which was also his last day of employment. A.793;A.599

In early January of 2008, EM, after noticing a large amount of deleted emails on his laptop, notified EM's counsel who then hired Kenneth Lacasse ("Lacasse") to perform a forensic analysis of Leness'

EM laptop computer. A.762; 756-759 Shortly thereafter, Lacasse conducted an investigation of Leness' laptop. A.756-759 Lacasse's investigation revealed, among other things, the following:

- Between October 17, 2007 and December 6, 2007, Leness copied to the Carbonite site his entire EM folder. A.759; A.763
- The EM folder contained, among other things, EM financial information (including Peachtree accounting information), EM customer information, EM product information, EM presentations and EM contracts. A.756-766
- EM's customer contracts and information related to "Goose" and others were copied to the Carbonite site. A.756-766
- Leness copied every EM document that was contained on his laptop to the Carbonite site. A.756-766
- Between October 17, 2007 and December 6, 2007, Leness copied 11G bytes worth of files which is the equivalent of eleven thousand reams of paper. A.756-766

Leness stored his entire file directory, including *his* EM file directory, *on* Carbonite. A.786 Leness admitted that the EM data and files that he copied onto Carbonite constituted EM's property. A.788

On January 2, 2008, Leness executed a program called "CCleaner." A.763-764 CCleaner is used to delete files from a laptop and cleans traces of the online activity and the history of install and removal of programs. A.764-766

Before he returned his laptop to EM on January 5, 2008, Leness deleted the Carbonite application from his laptop. A.766 Leness testified that the timing of his use of CCleaner software (only three days before returning the laptop to EM) was intentional. A.794

Once EM learned about the secret copying of all of EM's information in Leness' possession, Leness was terminated for "Cause" retroactively to October 17, 2007, the date on which he began secretly copying and moving EM's files to Carbonite in violation of his Employment Agreement. A.599 EM only paid Leness two months of severance because it learned of his Carbonite activity. A.599

If EM would have known on December 6, 2007 that Leness (1) purchased a subscription to Carbonite with his personal credit card, (2) copied all of EM's proprietary information (including EM's financial information, customer contracts and customer information) on EM's company laptop that Leness used for work to Carbonite in secrecy and (3) scrubbed the laptop clean only days before returning it, EM would have terminated Leness for cause under the Employment Agreement and would not have paid Leness any severance. A.599-600

**ARGUMENT**

I. Leness was terminated for cause-retroactively--because of his defalcation of EM's assets and, therefore, is not entitled to severance.

Massachusetts has not expressly adopted the "after-acquired evidence doctrine," although there exists authority to suggest that it has been implicitly adopted in Massachusetts. *See Prozinski v. Northeast Real Estate Services, LLC.,* 59 Mass.App.Ct. 599, 610-611 (2004) ; *citing Markovits v. Venture Info Capital, Inc.,* 129 F.Supp.2d 647, 653 (S.D.N.Y.2001) (opining that "the after-acquired evidence doctrine, when applied in Massachusetts courts, is generally

employed to justify wrongful terminations through evidence that the employee engaged in conduct that, although not known by the employer before termination, would have led to termination if known"), *citing Marcus v. Boston Edison Co.,* 317 Mass. 1, 5-6, (1944). In this case, the Trial Court acknowledged that "the after-acquired evidence" doctrine has not been expressly adopted in Massachusetts but that it had been discussed in *Prozinski.* A.231; *citing Prozinski,* 59 Mass.App.Ct. at 610-611.

In *Prozinski,* this Court acknowledged the "after-acquired evidence" doctrine but decided that it was not necessary "to rely on the after after-acquired evidence doctrine" based on the status of the live claims that needed to be decided in *Prozinski.* 59 Mass.App.Ct. at 612. Nevertheless, this Court, at least, implicitly acknowledged that the doctrine was available in Massachusetts if the particular facts of the case warranted it. This Court should expressly adopt "the after-acquired evidence doctrine" now as the information that EM learned after Leness' termination certainly would have justified EM

terminating Leness for cause under the Employment Agreement.[1]

When Leness secretly (1) purchased a subscription to Carbonite with his personal credit card, (2) uploaded all of EM's Proprietary Information (including EM's financial information, customer contracts and customer information) to Carbonite, (3) scrubbed his laptop clean only days before returning it and (4) failed to return promptly EM's Proprietary Information, "including all copies" Leness engaged in "defalcation" of EM's assets.

In this case, if EM would have known on December 6, 2007 that Leness engaged in such conduct, EM would have terminated Leness for cause under the Employment Agreement immediately and, rightfully, would not have paid Leness any further severance. EM could have terminated Leness for cause based on the Carbonite activity pursuant to pursuant to Section 5 (b) (i) of the Employment Agreement. As such, EM would not have been obligated to pay him severance.

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[1] The Trial Court did not reach the issue of whether the "after-acquired evidence doctrine" should be applied in this case because it concluded, erroneously as discussed *below,* that the term "defalcation", in the Employment Agreement, only applied to money and, therefore, there was no need to determine if after-acquired evidence would have justified terminating Leness for cause under the Employment Agreement.

Section 5(b)(i) of the Employment Agreement allows EM to terminate Leness for cause if Leness was found to have "engaged in...defalcation...of...other assets of the Company." See A.51 The Trial Court, however, erroneously concluded that "defalcation, as the term is construed in Massachusetts, has as an element the taking of money or its equivalent, and does not include other forms of company assets." *See* A.232 Thus, the Trial Court found that Leness' taking of EM's proprietary information did not amount to defalcation under the Employment Agreement because EM's proprietary information was not money. A.231-233

Under Massachusetts case law, however, defalcation is not limited to just money. *See In re Sullivan, 217* B.R. 670, 676-677 (D.Mass.1998) ("A defalcation refers generally to a failure to account for money **or** property entrusted to a fiduciary.") (emphasis added); *see also In re Carroll,* 140 B.R. 313, 316 (D.Mass.1992) (defalcation applies to "money or property"). Leness, as an officer and director of EM, is a fiduciary. *See Demoulas v. Demoulas Supermarkets, Inc.,* 424 Mass. 501, 518 (1997); *see also Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173, 179 (1986). Therefore, Leness'

taking of EM's proprietary information certainly amounted to defalcation of EM's assets under the Employment Agreement according to Massachusetts case law.

The Trial Court's conclusion that defalcation only applies to money is in direct contravention of the clear language of the Employment Agreement which differentiates between defalcation of "funds" and defalcation of "other assets." Thus, it is clear that the Employment Agreement contemplates defalcation of something other than "money or its equivalent."[2] Consequently, Leness' defalcation of EM's proprietary business information certainly would have allowed EM to terminate Leness for cause pursuant to section 5(b)(i).

The interpretation of a contract is generally a question of law. See *Daley v. J.F. White Contr. Co.,* 347 Mass. 285, 288 (1964); *Freelander v. G. & K. Realty Corp.,* 357 Mass. 512, 516 (1970). This court reviews "the judge's rulings on questions of law de

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[2] The Trial Court found that the phrase "other assets" only related to the "fraud" provision of the Employment Agreement. A.232 That interpretation, however, is unsupportable given that the entire phrase is "willful fraud or defalcation, **either of which** involved funds **or** other assets of the Company. (emphasis supplied). Thus, under the Employment Agreement's clear language either fraud or defalcation related to either funds or other assets of the Company.

novo." *Namundi v. Rocky's* Ace *Hardware, LLC.,* 81 Mass.App.Ct. 665, 668 (2012); *citing Trace Constr., Inc. v. Dana Barros Sports Complex,* LLC, 459 Mass. 346, 351 (2011).

Contracts that are free from ambiguity must be interpreted according to their plain terms. *See Freelander,* 357 Mass. at 516. In interpreting a contract, the court must construe all words that are plain and free from ambiguity according to their usual and ordinary sense. *Morse v. Boston,* 260 Mass. 255, 262 (1927). "The object of the court is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and purpose." See *McMahon v. Monarch Life Ins. Co.,* 345 Mass. 261, 264, (1962); *Kerrigan v. Boston,* 361 Mass. 24, 33, (1972); *Thomas v. Christensen,* 12 Mass.App.Ct. 169, 175(1981); *Finn v. McNeil,* 23 Mass.App.Ct. 367, 372 (1987). "[A]n interpretation which gives a reasonable meaning to all of the provisions of a contract is to be preferred to one which leaves a part useless or inexplicable." *Worcester Mut. Ins. Co. v. Marnell,* 398 Mass. 240, 245 (1986), quoting from

*Sherman v. Employers' Liab. Assur. Corp.*, 343 Mass. 354, 357 (1961).

The Trial Court's interpretation of the Employment Agreement, that limits defalcation to money, renders entirely meaningless the phrase "engaged in...defalcation...of...other *assets* of the Company" and makes the use of the word "funds" after defalcation superfluous if, indeed, defalcation itself only means the taking of funds as the Trial Court found. Such an interpretation should be avoided. *See Worcester Mut. Ins. Co.*, 398 Mass. at 245. The Employment Agreement makes clear that defalcation applies to "other assets" of EM and not just money. Thus, the Trial Court's interpretation of the Employment Agreement is incorrect--as a matter of law-and must be reversed.

Leness' breach of his Employment Agreement was a material breach that relieved EM of its obligation to pay Leness severance.

The Trial Court found that "Leness's surreptitious use of the Carbonite account, and his failure to disclose it or transfer the account data back to EM when he left the company in early January, violated Section 6(b) of the employment agreement..."

A.230 The Trial Court, however, held that such breach "was not a breach of a material term such that, standing alone, it would relieve EM of its obligation to pay severance." A.230

"While the question of whether a breach is material is typically one for the jury, *Prozinski,* 59 Mass.App. 599, cases do rise where the 'materiality question_admits..only one reasonable answer.'" *Teragram Corp., Marketwatch.com, Inc.,* 444 F.3d 1, 11 (1st.Cir.2006) (stating that when "the evidence on point is either undisputed or sufficiently lopsided," a court "must intervene and address what is ordinarily a factual question as a question of law"); *see also Dialogo, LLC. v. Bauza,* 456 F.Supp.2d 219, 225 (2006). Thus, this Court should review the Trial Court's determination that Leness' breach was not a material breach *de novo* as a question of law. *See Namundi,* 81 Mass.App.Ct. at 668.

A material breach is one that goes to an essential and inducing feature of the contract: i.e., the "root" of the contract. *Bucholz v. Green Bros. Co.,* 272 Mass. 49, 52 (1930); *Lease-It v. Massachusetts Port Auth.,* 33 Mass. App. Ct. 391, 396 (1992). A breach of fiduciary duty could amount to a

material breach of a contract, i.e., a "substantial breach going to the root of the contract." *Aerostatic Engr. Corp. v. Szczawinski,* 1 Mass.App.Ct. 141, 145, 294 N.E.2d 521 (1973). The existence of a material breach must be determined from the circumstances of each case. *Boston Housing Auth. v. Hemingway,* 363 Mass. 184, 200 (1973).

If a party committed a material breach of a contract, then the other party would be entitled to a judgment dismissing the breaching parties' contract claim. *Prozinski v. Northeast Real Estate Services, LLC,* 59 Mass. App. Ct. 559, 603-604 (2003). It is well established that a material breach of contract by one party excuses the other party from further performance as a matter of law. *Quintin Vespa Co. v. Construction Serv. Co.,* 343 Mass. 547, 554 (1962); *Hastings Assoc., Inc. v. Local 369 Building Fund, Inc.,* 42 Mass. App. Ct. 162, 171, *rev. den.,* 424 Mass. 1108 (1997).

Section 6(b) of the Employment Agreement states that Leness "will hold in confidence and not knowingly disclose or, except within the scope of his employment, knowingly use any Proprietary Information."

Section 6(b) also states that "[u]pon termination of the Employee's employment, he shall promptly return to the Company all items containing or embodying Proprietary Information (including all copies)..."

In early January of 2008, EM learned, after the forensic expert, Kenneth Lacasse, performed a complete analysis of Leness' EM laptop computer, the following:

- Between October 17, 2007 and December 6, 2007, Leness copied to the Carbonite site his entire EM folder.
- The EM folder contained, among other things, EM financial information (including Peachtree accounting information), EM customer information, EM product information, EM presentations and EM contracts.
- EM's customer contracts and information related to "Goose" and others were copied.
- Leness copied to the Carbonite website every EM document that was contained on his laptop.

- Between October 17, 2007 and December 6, 2007, Leness copied 11G bytes worth of files.

Leness admitted that the EM data and files that he copied onto Carbonite constituted EM's property.

On January 2, 2008, Leness executed a program called "CCleaner." CCleaner is used to delete files from a laptop and cleans traces of the online activity.

Before he returned his laptop to EM on January 5, 2008, Leness deleted the Carbonite application from his laptop. Leness testified that the timing of his use of CCleaner software (only three days before returning the laptop to EM) was intentional.

All of Leness' actions herein constituted a material breach of the Employment Agreement because confidentiality, protection of EM's trade secrets and Proprietary Information and the safe return of all of EM's Proprietary Information to it, including "all copies" after termination are all at the root of the Employment Agreement. A.53

Moreover, as Chang testified, maintaining the confidentiality of EM's customers' information is central to EM's business and EM goes to great lengths

(through Employment Agreements with its employees and Non-Disclosure Agreements along with the use of pseudonyms) to protect its customers' information. Without such protections, EM, and business like it in the investments industry, would fail. The copied files contained information the EM clients entrusted to EM that should have never gone outside of EM to any third party. Indeed, the Trial Court explicitly acknowledged that

> It cannot be doubted that EM's company records and data, including contracts, pricing information, correspondence and communications with clients, sales leads, and the like was critical information, access to which was necessary to permit the company to operate. Equally clear is the importance of protecting the company's proprietary information from those outside the company, including competitors..."

A.231

In this case, the evidence of a material breach is so sufficiently lopsided such that, as a matter of law, the Trial Court's determination that there was no material breach must be reversed.

Even if this Court determines that the Trial Court's decision as to material breach should be reviewed under the clearly erroneous standard,

reversal is still appropriate. "On review of a jury-waived trial, '[t]he findings of fact of the judge are accepted unless they are clearly erroneous." *Pangagakos v. Collins,* 80 Mass. App. Ct. 697, 701 (2011) *quoting T.W. Nickerson, Inc. v. Fleet Natl. Bank,* 456 Mass. 562, 569 (2010). A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *C.C.& T. Const. Co., Inc. v. Coleman Bros. Corp.,* 8 Mass. App. Ct. 133, 135 (1979).

In this case, the evidence is overwhelming that Leness, surreptitiously and intentionally, copied EM's proprietary business information and then attempted to conceal those actions from EM. The importance of EM's proprietary information is undisputed and the lengths to which EM went to maintain its confidentiality and protection is clear. As such, Leness' breach of the Employment Agreement--as it related to the EM's confidential proprietary information--went not only to heart of the Employment Agreement but to the heart of EM's business that included protecting its own proprietary and confidential information and

fulfilling its obligations of safeguarding clients' information against any unintended exposure of possession by third parties. As such, the Trial Court's determination that Leness' breach was not a material breach must be reversed.

**CONCLUSION**

As stated herein, the Trial Court's rulings that (1) the term "defalcation" in the Employment Agreement only applied to money and (2) Leness' breach of the Employment Agreement was not a material breach are incorrect as a matter of law and must be reversed. Moreover, to the extent that the Trial Court's ruling that Leness' breach was not a material breach is a question of fact, the Trial Court's finding is clearly erroneous and must be reversed.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 08-1950

EVENTMONITOR, INC.,
Plaintiff/Defendant-in-Counterclaim,

vs.

ANTHONY LENESS,
Defendant/Plaintiff-in-Counterdaim.

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT AFTER JURY-WAIVED TRIAL

Plaintiff EventMonitor, Inc., a Boston-based company, brought suit against its former employee, defendant Anthony Leness, asserting claims for breach of contract, breach of the implied covenant of good faith, and breach of fiduciary duty) Leness answered asserting similar , counterclaims against EventMonitor.

On August 6-10, 2012, the Court conducted a jury-waived trial. Four witnesses, Sheldon Chang, Anthony Leness, Kenneth LaCasse, and Marc Dupre testified, and a total of 54 documentary exhibits were received into evidence. Each party thereafter submitted proposed findings of fact and rulings of law. Assessing all of the credible evidence, I make the following findings of fact and rulings of law.

Additional claims and counterclaims were withdrawn by the parties at the time of trial. The Court directed verdicts against the plaintiff (without objection) on its claims for misrepresentation (Count VI),, and unjust enrichment (Count VII), and negligence (Count VIII).

## FINDINGS OF FACT

EventMonitor, Inc. ("EventMonitor" or "EM") is a Delaware corporation with offices in Boston. It was founded by Sheldon Chang in 2000. Chang serves as Chairman of the Board, President and CEO. EventMonitor is engaged in the development, marketing and sales of software programs serving the financial industry. Chang has a PhD in mathematics, served on the faculty of Harvard and MIT, and worked in the late 1990's for a hedge fund in Boston and as a vice president of the Societe Generale Bank's New York office. Chang was interested in applying mathematical models to the synthesis of disparate data important to the financial industry in making pricing decisions. By the end of 2000, Chang and a colleague, Thomas Yelen, had a working version of a data platform upon which EM's computer products are based. The company, which originally operated out of Chang's basement, acquired office space in a loft in Boston.

2. Anthony Leness ("Leness") worked as an investment analyst in the financial industry before entering Harvard Business School in 1999. While a student there, Leness met Chang and did a graduate internship at EM in 2000. During the 2000-2001 academic year, Leness and several classmates developed a business plan for EM as a class project.

3. When Leness graduated Harvard in June, 2001, Chang offered him a job-as Vice President for business affairs at EM. The men (and their respective attorneys) negotiated the terms of Leness's employment, that were ultimately set forth in a written employment agreement dated June 1, 2001. Both parties acknowledge and agree that this -agreement is a valid contract upon which many of the claims and counterclaims here are based.

4. The contract provided, inter alia, that Leness would become a co-director, would

receive stock options in the closed corporation, and would receive a fixed annual salary and, in Chang's discretion, an annual bonus. Leness was also entitled to 15 vacation days per year and to accrue unused vacation days.

5. Section 5 of the contract contained termination provisions. Section 5(b), entitled, - Termination For Cause, provided that EM could terminate Leness immediately if he (I ) engaged in willful fraud or defalcation of company monies or assets; (2) was convicted of a *felony; or (3) intentionally* refused to perform duties after notice and a 30-day cure period. Section 5(d) provided that Leness could be terminated without cause based on 30 days advance notice. If terminated under this section of the contract, Leness was entitled to payment for unused vacation time, plus continued salary for 12 months, "provided employee has not commenced other full-time employment."

6. Section 6(b) of the contract contained a non-disclosure provision relating to EM's proprietary information. It provided that Leness would not knowingly use or disclose such information and, upon termination, "shall promptly return to the Company all items containing or embodying Proprietary Information (including all copies)," subject to exceptions not relevant to the case. Proprietary Information was defined in Section 6(b) to include, "all other business, technical and financial information (including without limitation, the identity of and information relating to customers, investors, vendors, business partners or employees of Company . ..".

7. Finally, the contract* contained an Indemnification clause. Section 10(h) provided that the company would indemnify Leness, "if [he] is made a party . . . to any action, suit, or proceeding . . by reason of the fact that [he] is or was an employee . Officer, or

director of the company . .. against any and all costs, losses, damages, judgments, liabilities and expenses (including attorneys' fees) which may be suffered or incurred by him in connection with any such action, suit or proceeding."

S. EM, initially consisting of Chang, Leness, and one other consultant, grew and prospered between 2001 and 2007. In large part through Leness's connections, EM attracted outside investors who provided $1.6 million in capital. The company developed two profitable software products called EventMonitor Research Protocol ("EMRP") and later, EventMonitor Event Detection ("EMOD"). The EMRP or related programs were leased, through licensing agreements, to financial companies including Morgan Stanley, Bear Stearns, Trafelet & Company, LLC. ("Trafelet"), Magnetar Capital, LLC ("Magnetar"), and Seneca Capital Advisors ("Seneca"). The EM programs synthesized data from a broad spectrum of business, financial, governmental, media, and other sources, to provide financial analysts with information pertinent to investment decisions on single computer screen. EM billed its customers in four stages: proof of concept, service development and installation, annual licensing fees, and a service agreement. The licensing fee was based on the number of client users. Trafelet, Magnetar, and Seneca, referred to internally as "Truffles," "Polaris," and "Goose," respectively, became EM's dominant clients.

9. Trafelet & Co., whose president invested $100,000 in EM in 2002, becarnea client in 2003 with a licensing agreement for $96,000 per year. In 2005 and into 2006, EM performed a major upgrade to the system, incurring development costs of $361,000, but without a specific written agreement covering the new work. In an April 18, 2006

letter from Leness to Trafelet, Leness set forth a pricing proposal wherein EM would charge a discounted fee of $300,000 for its development services, and an annual licensing fee of $400,000 based on an anticipated 29 users. I credit Leness's testimony that in a follow up telephone call, Trafelet accepted the terms of the letter proposal, as evidenced by the fact that they in fact paid the $300,000 service charge and began paying a licensing fee at the new rate. As well, EM's internal records and correspondence support that conclusion (e.g. Ex. 45; letter from Ginni Stoddard). I find, to the extent necessary for the instant case, that there was a contract in effect regarding the upgraded system. Thereafter, in 2007, Trafelet sought a back up system for its London office and EM developed and provided the system, billing and receiving $150,000. However, despite Chang's repeated requests, Leness never obtained a separate licensing agreement for the London system and, in 2008, Trafelet disputed a $100,000 licensing fee, claiming that it was covered under the earlier contracts. Through 2008 and into 2009, Chang negotiated with Trafelet over the debt, ultimately settling EM's claim for substantially less than Chang believed was owed. The settlement was motivated, at least in part, by Chang's

concern that Trafelet might go under due to the world-wide recession.

10. Magnetar was a hedge fund located in Evanston, Illinois. In August, 2005, they signed an agreement with EM to develop and install the EMRP system, with an annual licensing fee of $350,000. Magnetar made payments according to the licensing fee. However, beginning in 2005 or 2006, EM dedicated a large amount of staff time to upgrading Magnetar's system, ultimately incurring development and production costs into 2008 totaling approximately $500,000. The system became operational in the Spring of

2008. There was no separate written contract for the system upgrades, a fact known to both Chang and Leness. They both had a concern that Magnetar might cancel its contract altogether based on the fact that although the technology department at Magnetar was enthusiastic about EMRP, there was little actual use of the system by fund managers or analysts. I find that although Chang was concerned about the lack of a contract for the system upgrades, he accepted Leness's advice or judgment that EM should not bill Magnetar until the new system became operational. Indeed, this is borne out by the fact that after notifying Leness of his discharge, in December, 2007, EM nonetheless continued providing development services without a written contract, incurring nearly $200,000 in additional costs. Following the completion of the upgrades in March, 2008, EM billed Magnetar $496,498 for work performed from 2005-2008. Magnetar refused to pay and Chang was forced to settle the claim in 2009 for roughly half the amount due ($250,000).

Seneca was a New York based hedge fund. EM customized a system for Seneca in 2005 under a written licensing and service agreement. In 2007, Seneca sought a second system, the EMOD (referred to as "EMED"), and EM developed and installed the system, billing (and being paid) periodically. However, Leness did not obtain a written licensing and service agreement for the EMOD system. In 2008, Chang proposed that Seneca pay a licensing fee of $180,000 for the EMOD system, a proposal Seneca apparently did not accept. Notwithstanding, EM permitted use of the system without a licensing agreement throughout 2008 and did not submit invoices to Seneca until the Fall of 2008. At about the same time, as the economy collapsed, Seneca downsized and stopped paying for the

EMOD system. In January, 2009, Seneca sent EM a letter of termination, claiming that they had paid over $3 million dollars for a system that was late in development and no longer being used. Seneca refused EM's demand for additional payments.

12. By 2007, tensions developed between Chang and Leness regarding the operation and future of EM. Leness proposed separating components of the company to permit Chang to focus on research and development while Leness oversaw existing product sales and placement. According to Chang, Leness phrased his idea as "a sweet deal" for EM. Chang told Leness he would consider a restructuring provided that the capital structure for EM was enhanced.

13. EM's general counsel, Marc Dupre, was involved in these discussions and, at Leness's request, provided a template to be used in preparing a proposed spin-off company. Leness exchanged e-mails and had phone conversations with Dupre exploring various structures to split EM. Leness presented Chang with a written draft proposal on October 17, 2007, which proposed two companies: EM, and a new entity called "Newco" (see Exhibit 14). The proposal contemplated splitting EM's technology: the EMRP and EMOD products, which produced the bulk of EM's gross revenues, would become assets of the new spin-off company. EM would retain the core platform (upon which its individual products were based) and three other projected products called EMDA, EMEX, and EMEM. Because the spin off company would take most of the cash assets of EM, Leness proposed that Newco would loan working capital to EM at prevailing market interest rates.

14. Although the written proposal was labeled as a "DRAFT: *For Discussion*

*Purposes Only,"* Chang rejected it out of hand, viewing it as stripping EM of its capital and most valuable revenue source. A component of the proposal *providing* for stock swaps; would have given Leness a greater percentage of stock in the new company. *Chang believed that* Leness's *proposal was* motivated by self-dealing and self-interest, that Leness was not loyal to EM and should be terminated.

15. By letter dated December 5, 2007 (sent by e-mail on December 11, 2007), Chang notified Leness that his employment would be terminated pursuant to Section 5(d) of his employment agreement, which was a "Termination Without Cause." Leness enlisted some of EM's investors, including Seth Brennan and Ben Levin, to weigh in on the spinoff proposal, which led to a meeting between Leness, Chang and Levin.

16. As noted, the employment agreement required a 30-day notice requirement for termination without cause. It also required a return of all company assets, equipment,. and,.. data. Leness cooperated with EM in providing requested information and returning his company equipment, including his company laptop. Upon his separation from EM on January 5, 2008, he received biweekly severance checks through the middle of February.

17. Chang engaged *Ken* Lacasse, a *forensic* computer specialist, to inspect Leness's company laptop. Lacasse reported two surprises. He retrieved data showing that at about the time of the October, 2007 Newco proposal, Leness signed up with an on-line data storage service called Carbonite. He paid for a year's subscription and copied all of his EM files onto the Carbonite system. Leness never disclosed this activity to Chang or anyone else at EM. He also downloaded a deletion program called Ccleaner.v.vhich he used (unsuccessfully it turns out) to erase the Carbonite activity from the company laptop.

18. Although Leness never provided EM with his Carbonite account number or password, there is no evidence showing, or even suggesting, that Leness improperly used or disclosed the EM data stored on the Carbonite system.

19. When Chang learned of the Carbonite activity, he directed EM to convert Leness's termination **from** a Termination Without Cause (Section 5(d)) to a Termination For Cause (Section 5(b)) under the employment agreement, effective back to the date of termination. Consequently, he refused to provide further severance payments or buy back unused vacation. Leness engaged an attorney, obtained approval from the Attorney General to pursue a wage claim violation, and threatened suit if EM failed to pay. severance by May 1, 2008. EM filed suit on April 30, 2008.

20. Leness sought payment of his annual salary for the full year following his termination based on the severance provision in his employment contract. He is now employed as a partner in Lincoln Peak Capital, an investment company formed by Benjamin Levin in 2008. Although Leness is listed on the Lincoln Peak website as a co-founder of the company (incorporated in May, 2008), he testified that he was not actively involved in forming the company and was not employed by the *company* throughout 2008.

DISCUSSION

Against these factual determinations and supplemented by additional facts relating to individual claims, I will address the various claims and counterclaims that remain, the parties having dismissed certain claims as follows: EM has dismissed its claims for Misrepresentation (Ct 6), Declaratory Judgment and Unjust Enrichment (Ct. 7), Negligence (Ct. 8); and Leness

having dismissed counterclaims against Change individually (Ct. 4-Breach of Fiduciary Duty; Ct. 5-Self-Dealing; Ct. 6 Intentional Interference with Advantageous Contract relations; Ct. 7-Conflict of Interest; Ct. 8-Defamation; Ct. 9 Derivative Shareholder Claim; and Ct. 10-Demand for Access to company books and records.

EM's CLAIMS

Count One: Breach of Contract

To prove a breach of contract, the party asserting the claim must establish, by a preponderance of evidence, four elements:

1. That there was a binding and enforceable agreement, either in writing or by oral agreement;
2. That the party asserting the breach claim had performed its obligations under the time at the time of the breach;
3. That the other party breached the contract;
4. That as a result of the breach, the party suffered damages

Sirmarella v. Boston, 342 Mass. 385, 387 (1961).

EM contends that Leness breached the terms of his employment contract, specifically, his duties as Vice President of Business Development, by failing to obtain lease or service agreements with Trafelet, Magnetar, and Seneca, for all aspects of their purchased services, which put EM is a weakened negotiating posture with each of these companies when, in 2008, they ceased using or fully paying for EM's products or services. The claim is novel --that a company can sue its employee for neglecting their duties which causes or perhaps contributes to some loss. EM cites no authority for such a cause of action other than reciting general contract

principles of law (the existence of a binding contract, a duty imposed, the breach of duty, and damages caused by the breach). I do not accept EM's invitation to expand the law in this regard. Absent a claim that the employee engaged in conduct absolutely antithetical to their employer (e.g. selling company merchandise out the back door, accepting bribes, selling company secrets and the like), the remedy for any employee's failure to perform or negligent performance of an essential job function is to discharge the employee. One can well imagine the flood of litigation that might ensue if an employer could sue an employee every time they failed to answer the phone resulting in a lost sale or prospective client, made a poor sales presentation or failed to perform a service, function or repair properly.

Even if such a cause of action was recognized in Massachusetts, EM has failed to show that Leness's conduct constituted a breach, nor has it established that its damages, from the Trafelet, Magnetar and Seneca contracts, were caused by the absence of written licensing or, service agreements. As to the first issue, Leness's position as vice president for business development included responsibility, under the direction of Chang as president, for contracting with customers and clients. However, the manner in which Leness performed his duties permitted a wide range of professional judgment and a breach is not shown merely by evidence that a written agreement for each type of service upgrade would have, in hindsight, better protected EM in asserting claims for payment. Leness testified credibly, and F find, that there were valid business reasons underlying his decision not to press Trafelet, Magnetar, and Seneca for *new* licensing or service agreements. His failure to obtain such agreements was not the result of any dereliction or misfeasance in the performance of his duties but was a legitimate business judgment made in what he believed was the best interest of EM at the time. Moreover, although

Chang expressed concern about the fact that new agreements had not been obtained, he never expressly ordered Leness to obtain them or to stop providing services to any of the companies. Regarding the issue of damages, Dr. Chang acknowledged that the clients ceased using the EM products primarily because of the collapse of the financial sector in 2008. At least as to Magnetar, the company was teetering on the edge of bankruptcy when Chang settled EM's claims for half of what he believed was owed. I do not credit the claim that "but for" Leness' failure to obtain written contracts, EM would have successfully recovered all of the monies it claims were owed. Notably, other than Dr. Chang's testimony on this issue, EM failed to present any corroborative evidence showing that any of the three clients refused payment solely because of the absence of a specific written contract.

**Count Two: Breach of Implied Covenant of Good Faith and Fair Dealing**

Every contract implies a covenant of good faith and fair dealing between the parties. It imposes on each party a duty to act fairly and not to do anything that will have the effect_of destroying or injuring another party's right to the fruits of the contract. Generally, a breach of the covenant of good faith requires more than proof of a simple breach of contract: it involves bad faith conduct reflective of a dishonest purpose. It is often characterized by deceit and subterfuge. Hallmark cases in Massachusetts establishing these principles include Fortune v. National Cash Register Co., 373 Mass. 96, 104 (1977); Anthony's Pier Four, Inc v. HBC Associates, 411 Mass. 457 (1991); *Uno* Restaurants. Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376 (2004); and more recently, Targus Group International_Inc. V. Sherman, 76 Mass. App. Ct. 421 (2010). -

EM asserts that Leness breached the implied covenant of good faith and fair dealing by failing to obtain binding agreements with Trafelet, Magnetar, and Seneca regarding new or

upgraded services or systems. As with its breach of contract claim, EM has failed to establish the elements necessary to sustain this claim. While it is clear that there was no written agreement for at least *some* aspect of the services provided to each of the clients, EM has not shown that Leness was motivated by any improper or dishonest purpose, or that the failure to obtain binding agreements was caused by gross neglect or malfeasance. To the contrary, the evidence shows that these clients were EM's cash cows, providing substantially all of EM's annual revenues. Leness, with Chang's knowledge if not express approval, treated them gingerly in terms of billing. Each client was paying regularly under their existing licensing agreements, even in some cases (as with Magnetar and Seneca) where the system was not widely accepted by analysts, and there was a valid concern that if pressed too aggressively, the client could cancel the entire contract (as happened with Seneca in 2009). I find that Leness's failure to push for new or revised agreements was a calculated, strategic business decision, made in what he perceived to be the best interests of EM. If the mere failure to obtain a binding agreement or contract were to constitute a breach of the implied covenant of good faith under these circumstances, then Chang would be equally culpable, having himself failed to obtain binding agreements for months to a year after Leness had been discharged.

Count Four Breach of Fiduciary Duty

This claim relates to Leness's role 'as a corporate officer and director of EM. Both parties correctly cite that this claim must be analyzed applying Delaware law since EM is a Delaware corporation. Harrison v. NetCentric Corp., 433 Mass. 465, 472 (2001). Under Delaware law, an officer or director must act in good faith toward the interests of the company and must, in making business decisions, be aware of all materially important information and exercise due care in the

discharge of their duties. In short, officers and directors have a duty of loyalty and a duty of care. Both parties have recited the controlling Delaware law in their respective proposed rulings and there is no need to cite them here.

In its proposed Rulings, EM asserts that Leness breach his fiduciary duty by failing to obtain binding agreements with Trafelet, Magnetar, and Seneca. This claim does not stand, for essentially the same reasons as with claims for breach of contract and breach of the implied covenant of good faith. As found as fact, Leness made a strategic business decision with regard to the timing of putting forth new agreements and his judgment, known to Chang, is not manifestly unreasonable. It certainly would not constitute gross negligence.

In their complaint, EM also referenced that Leness's spin-off proposal that was submitted to Chang on October 17, 2007, was evidence of a breach of his fiduciary duty. Neither party has addressed this issue in their proposed Rulings of Law. If EM is advancing a claim in . this reprcl, it is unavailing. Although there is some evidence that Leness may have benefitted from a restructuring of EM into two companies, his proportionate share of the prefen¯ed stock increasing, that alone is not enough to establish self-dealing violative of a duty of loyalty. The Newco proposal was just that - *aproposal.* It stated that it was presented *"For Discussion Purposes Only".* Considering all of the evidence presented, I find that Leness was motivated to restructure the companies so that he and Dr. Chang could co-exist in relative tranquility, as opposed to the strained and unpleasant work environment that had developed.as the company grew. In this regard, I am persuaded, and credit, the testimony of Marc Dupre who was actively involved in the spin-off discussions, serving as a communication liaison between Chang and Leness. Dupre saw nothing untoward in the spin off proposal, and it did not change his

impression or opinion of Leness as a competent and diligent officer of the company. As well, I do not find that Leness's communications with other investors, including Seth Brennan and Ben Levin, show some improper motive or intent on Leness's part. His use of the Latin phrase, "inter alia est", translated to "the die is cast," in an e-mail to Seth Brennan on the eve of submitting the Newco proposal to Chang, is not, in my view a declaration of war, as it was when Cesar crossed the Rubicon - rather it reflected a concern or belief that submitting the proposal would likely elicit a strong response from Dr. Chang and would significantly alter the relationship between Chang and Leness. In this prognostication he was entirely correct.

LENESS COUNTERCLAIMS

Count One Breach of Contract

Leness asserts a claim for breach of contract based on EM's refusal to pay him severance and benefits (accrued and unused vacation time). His right to these payments is established under Section 5(d) of his employment agreement. There is no dispute but that the employment agreement constitutes a valid and enforceable contract, setting forth the rights and obligations of each party.

Leness's right to severance and benefits payments is predicated on his termination "without cause." When he was initially given notice of termination in December, 2007, EM provided thirty days notice, as required under Section 5(d). Moreover, Chang testified that he did not rely on a "for cause" determination at the time he decided to terminate Leness's employment. Finally, EM made severance payments commencing in January, 2008 and continuing into the middle of February, the amounts corresponding to a bi-weekly percentage of Leness's annual $175,000 salary.

Things changed when Chang learned of the results of the forensic analysis of Leness's company laptop. Learning of Leness's surreptitious account with Carbonite, his e-mail correspondence with investors (particularly Seth Brennan and Ben Levin, which suggested same collusion to create the spin-off company), and discovering the downloading and use of a computer scrubbing program, Chang decided that Leness's conduct provided adequate grounds for firing him without further compensation or benefits.

Assessing all of the evidence, I find that Leness secretly uploaded all of the company files he possessed into the Carbonite storage site. I further find that he did so with the intent to conceal *his* possession of this data from Chang and EM, as evidenced by his use of a personal credit card to pay the Carbonite annual fee and his use of the Ccleaner software to attempt to erase any computer trace to Carbonite. I do not credit Leness's explanation that he used Carbonite because he was worried about the stability of EM's internal back up systems. . lfsuch were the case there would be no reason not to disclose the fact to Chang or other co-workers, nor to pay for it with personal rather than company funds.

I find that Leness's surreptitious use of the Carbonite account, and his failure to disclose it or transfer the account data back to EM when he left the company in early January, violated Section 6(b) of the employment agreement, which provided for the return of "all items containing or embodying Proprietary Information, including all copies," with exceptions not applicable here. Leness's conduct constituted a breach of the employment contract. However, it was not a breach of a material term such that, standing **alone, it** would relieve EM of its obligation to pay severance. A material breach of an agreement occurs when there is a breach of "an essential and inducing feature of the contract" Lease-It. Inc. v. Massachusetts Port Authority, 33 Mass. App.

Ct. 391, 396 (1992)(citations omitted). Here, the breach was of a section entitled, "Non-Disclosure". It cannot be doubted that EM's company records and data, including contracts, pricing information, correspondence and communications with clients, sales leads, and the like was critical information, access to which was necessary to permit the company to operate. Equally clear is the importance of protecting the company's proprietary information from those outside the company, including competitors and, in some clients, customers and clients. Thus, Leness was obligated by Section 6(b) not to knowingly use or disclose proprietary information, and to return his files to enable the company to continue business without interruption. Leness fulfilled both of these obligations in the sense that he returned a complete set of his company files and data, and he never used or disclosed the company's proprietary information for any purpose. The variance from complete compliance with the non-disclosure section occurred by Leness's use of the Carbonite service to copy and store his files. Merely retaining copies of records, without any evidence of an actual or intended misuse or disclosure to the detriment of the company, cannot be said to constitute a violation that went to the heart of the contract.

At issue then, is whether Leness`s breach provided EM with adequate grounds to convert a termination "without cause" into a termination "for cause." Massachusetts has not expressly adopted the doctrine of "after-acquired evidence", though it has not expressly rejected it either. It was last addressed by the appellate courts in Prozinski v. Northeast Realty Services, 59 Mass. App. Ct. 599, at 610-611 (2004), a case that has many similarities to the instant case. As with Prozinski, the Court need not decide whether evidence of misconduct, discovered after an employee's discharge without cause, may permit an employer to change the grounds for _ discharge to a "for cause" basis, because here it would make no difference.

Section 5(b) of the employment agreement limited the grounds for Termination For Cause. The parties agree that the only specified basis applicable here would be the provision relating to a finding by the majority of the Board that Leness (as employee) had "engaged in willful fraud or defalcation, either of which involved funds or other assets of the company". EM does not assert that Leness committed a "fraud," but contends that the back up of company files onto Carbonite constituted a defalcation. Defalcation, outside of its construction within the bankruptcy code, has been customarily and consistently limited to the wrongful misapplication or conversion of *monies,* typically by a fiduciary. Indeed, in my review of Massachusetts appellate cases over the past century, involving more than 50 decisions, all dealt with a pecuniary taking.

It can therefore be said that defalcation, as the terms is construed in Massachusetts, has as an element the taking of money or its equivalent, and does not include other forms of company assets. Because Section 10(e) of the employment agreement contained a choice of law provision specifying that the agreement would be construed according to Massachusetts law, the term is construed according to its general meaning in Massachusetts. Moreover, the term should not be given a different meaning because Section 5(b) contained a reference to "money or *other assets of* the Company" I *construe this language as applying* to the "fraud" provision of the agreement but not intended to alter the clear meaning of the term "defalcation."

Additionally, there is no evidence showing that Leness, in backing up company files onto - Carbonite, thereby converted it to his own use, or deprived EM of its ability to make exclusive use of the information. The reasons for the Carbonite upload are unclear. While I reject Leness' claim that he did it to protect EM's interests because the company had unsatisfactory archive systems in place, I similarly reject EM's contention that Leness was motivated by some nefarious

purpose or with an intent to injure EM. Most likely, he did it because he knew that his October, 2007 spinco proposal was going to intensify the already strained relationship he and Chang had, and could well lead, as it ultimately did, to Chang terminating his employment. In this scenario it is easy to understand why Leness might want a full record of the company's activities, as a form of insurance against claims that he mismanaged the company. What is clear, however, is that despite the passage of five years since the upload, no information has developed showing that Leness used, disclosed, or disseminated any of EM's proprietary information, or that he planned to do so but for EM's discovery of the Carbonite account.

From all of this, I rule that the use of the Carbonite account does not provide grounds for a termination for cause under the employment agreement, and that EM breached the agreement by failing to provide payments to Leness according to the Termination Without Cause provisions of the agreement.

Section 5(d) provided that if terminated without cause, Leness was entitled to his salary, benefits, accrued but unpaid bonus and vacation through the termination date, and salary, benefits and vacation time for a 12-month period after the termination date, "provided the Employee has not commenced other full time employment."

EM seeks to limit its exposure under Section 5(d) by advancing two arguments. First, EM contends that any severance is capped at payments up to but not *beyond May 8, 2008.* This is because Leness now works as a partner at Lincoln Peak Capital, a company founded by Ben Levin in 2008. According to a Lincoln Peak webpage, Leness is characterized as working for EM "prior to founding Lincoln Peak .. ." Lincoln Peak Capital was incorporated on May 8, 2008, therefore, says EM, Leness must have been engaged in "full-time employment" in terms of

founding a new company. Leness testified, to the contrary, that while he has a title of "partner," Ben Levin *is* the sole owner of Lincoln Peak and Leness was not actively involved or associated with its creation or founding, and was not fully employed during 2008.

I am not satisfied that EM has presented sufficient evidence to support the claim that Leness was in fact engaged in full-time employment as of May, 2008. The mere reference to a web page listing which not surprisingly may include a tad of marketing exaggeration, is not in my judgment *adequate* to *overcome Leness's* sworn denial. Where, as here, litigation has spanned over four years and involved extensive discovery, I would expect that if Leness had been fully employed there would have been better evidence to demonstrate.the fact (for instance, tax returns showing income, Lincoln Park records and the like).

EM also asserts that the 12-month severance provision was conditioned by an obligation that Leness take reasonable efforts to find full-time employment. The obligation, if it exists,, must be *implied* because it is not expressly set forth in the employment agreement. 1 find no reason why the Court should imply that which could easily have been made express. The language used, "provided that the employee has not commenced other full-time employment" is clear and unambiguous, "not susceptible of more than one meaning." Citation Insurance Co. v. Gomez, 426 Mass. 379, 381 (1998). In interpreting a contract, "the court must construe all words that are plain and free from ambiguity according to their usual and ordinary sense." Suffolk Construction Co. v. Lanco Scaffolding Co., 47 Mass. App. Ct. 726, 729 (1999). Here, the only limitation to a year of *severance* is other "full-time employment. The employment agreement was the result of arms-length negotiation between sophisticated business persons, both with access to counsel.

Under these circumstances, the agreement should be enforced as written. Accordingly, I rule that there was no obligation imposed by contract that Leness seek other employment during the year following his discharge, and I find that he did not engage in full-time employment during that time period. Consequently, under the breach of contract claim, Leness is entitled to receive the benefit of his contract which, in this instance, is his severance package. Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 374 (2008). Judgment shall enter for Leness in the amount of $155,950 in unpaid severance (annual salary less payments made into February, 2008), plus $10,096.15 representing value of 15 days vacation.

Count Two Breach of Implied Covenant of Good Faith

As noted earlier, every contract implies a covenant of good faith and fair dealing, neither party doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of their contract. Leness contends that EM breached the covenant of good faith in a variety of ways, including making false representations about Leness after he was discharged, presenting Leness with a materially different set of conditions upon which he would receive severance, *by* denying him severance and accrued but unused vacation compensation, and by bringing the instant lawsuit.

Chang informed Leness that he was being terminated in a conversation on December 6, 2007, which was subsequently communicated in written form several days later. The termination was undisputedly "without cause" at that point in time. EM's right to terminate Leness, and Leness's rights upon termination, were clearly established in the employment agreement. However, in a four-page letter dated December 10, 2007, Chang set forth 13 conditions governing Leness's right to severance checks. (Exhibit 20). The letter began, "This letter is to

confirm the agreement between you and [EM] regarding your resignation from the Company." Incorrectly referencing that Leness had resigned rather than been terminated, Chang described an *agreement* that did not exist. Further, Chang sought to impose new conditions on Leness in order to receive severance, including a waiver and release of any claims he had against the company or its officers and directors, and a non-disparagement clause. This had the effect of threatening to withhold rights already established in the employment contract unless Leness agreed to the new conditions. In making this demand (and falsely characterizing it as a new "agreement,"), EM acted in violation of its covenant of good faith and *fair dealing.* See, e.g. Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451, 473 (1991)(demanding additional concessions in order for a party to receive fruits of existing contract violates covenant of good fair and fair dealing).

EM similarly breached the covenant of good faith in failing to pay Leness for unused but accrued vacation time. His right to this benefit was secured under the termination provisions of the employment contract regardless of whether termination was with or without cause. Thus, even though EM later asserted that Leness would not be entitled to severance pay after its discovery of the Carbonite account, a conversion of the grounds for termination from Section 5(d) to Section (b) did not permit EM to withhold payment of unused vacation time, regardless of whether they agreed with Leness's calculation as to the number of days owed.

Ruling that EM breached its covenant of good faith and fair dealing, I find that the damages are the same as those arising out of Leness's claim for breach of contract.

Count Three Indemnification Claim

An indemnity provision is to be construed according to ordinary contract principles, Speers v. H.P. Hood, Inc., 23 Mass. App. Ct. 598, 600 (1986), in order to ascertain the intention

of the parties and to effectuate the purpose sought to be accomplished. Shea v. Bay State Gas. Co., 383 Mass. 218, 222 (1981). Where the language of the indemnity clause is clear and unambiguous, it will be construed according to its plain meaning. Suffolk Construction Co. v. Lanco Scaffolding Co., 47 Mass. App. Ct. 726, 729 (1999). "Contract language is ambiguous when an agreement's terms are inconsistent on their face or where the phraseology can support reasonable difference of opinion as to the meaning of the words employed and obligations undertaken. Post v. Belmont Country Club, Inc., 60 Mass. App. Ct. 645, 652 (2004). Public policy is not offended by an indemnification clause protecting a tortfeasor from their own negligence. Id.

Leness claims that he is entitled to be reimbursed for all costs related to the instant litigation based on an indemnification clause contained in his employment agreement. Section 10(h) provided,

> To the fullest extent permitted by law and in addition to any other rights permitted or granted under the Company's certificate of incorporation and by-laws, each as amended to date, or any agreement or policy of insurance, or by law, the Company shall indemnify the Employee if the Employee is made a party, or threatened to be made a party, to any threatened, pending or contemplated action, suit or proceeding, whether civil or criminal, administrative or investigative, by reason of the fact that the Employee is or was an employee, officer or director of the Company of [sic] any subsidiary of the Company, in which capacity the Employee is or was serving at the Company's request, against all costs, losses, • damages, judgments, liabilities and expenses (including attorneys' fees) which may be suffered or incurred by him in connection with any such action, suit or proceeding.

The clause is both broad and limited in scope. It purports to provide proteCtion, in the form of promised reimbursement, for any costs or expenses Leness might incur *as* a result of a broad variety of claims made against him arising out of his employment with EM. The nature of

the claim (civil, criminal or administrative) and the forum in which it is pursued are immaterial to the right to indemnification, so long as the claim arises, "by reason of the fact that the Employee was an employee, officer or director of (EMI . " Without more, the plain meaning of the language used would seemingly apply to the instant litigation, which arose out of Leness's employment relationship with EventMonitor.

However, Leness's right to indemnification as an employee, officer or director, is conditional; the challenged act or conduct must have been within the scope of the employee's duties and in furtherance of their employment. Thus the additional language, "in which capacity the Employee is or was serving at the Company's request .. " Giving meaning to this qualifying language in construing the indemnification clause, it is apparent that the scope of Leness's right to indemnification is based upon whether the challenged activity was within the scope of his duties.

To determine whether Leness is entitled to be indemnified according to the terms of his employment agreement, it is helpful to review the circumstances leading up to and surrounding the instant litigation. Leness and Chang started out, in 2000 and 2001, as close confidantes excited about the prospect of building a new company. EventMonitor had a product that had the potential to significantly simplify the analysis of market data within the financial industry. As with a pharmaceutical company launching a new drug, there was a potential for great sales.and great profit to the company. Chang had the technical background and expertise to create a computer platform for EM's product as well as the vision to see its many uses,. and Leness. brought to EM a business approach and plan that would establish the company. As time went on and as the company grew, Chang and Leness grew apart, their visions for the company differed

and they ceased working cooperatively. A loss of confidence in one another developed as did a level of distrust and suspicion. Chang viewed Leanness's October, 2007, spin-off proposal as confirmation of his view that Leness was trying to take over the company. it cemented his conviction that the company would be better off without Leness, and led to the decision to terminate his employment in December.

Notwithstanding his distaste for Leness, and his attempt to negotiate additional terms for severance, Chang acknowledged that Leness was entitled to severance benefits because he was terminated without cause. Had nothing else occurred, this likely would have been the end of it (with perhaps some haggling about the number of accrued vacation days). As of that time, Leness had fully cooperated in the transition process before he left, providing information about customers and accounts and returning his company equipment Everything changed, however, after the forensic examination of Leness's company laptop. Leness's subscription to the Carbonite service and his use of scrubbing software to eliminate the activity, cemented in Chang's mind that Leness had been (and was) a traitor to the company. The instant litigation, now spanning over four years, was a direct consequence of the Carbonite discovery.

As noted earlier, I do not credit Leness's claim that he used Carbonite to protect the company's data or for any other valid company purpose. His surreptitious subscription to the Carbonite system, his copying of company files, and his failure to return or disclose those copies, were acts outside the scope of Leness's duties with the company and violated the terms of his employment agreement. Consequently, Leness was not acting in a *"capacity the [EJmployee is or was serving at the Company's request,"* as required under the indemnification clause of his employment agreement. Because his unauthorized conduct was the precipitating cause for the

litigation that followed, he is therefore not entitled to the benefit of the indemnification clause.

Count Twelve Wage Act Claim

General Laws, c.I49, § 148, requires the timely payment of wages, which include vacation payments due an employee under an oral or written agreement. Violation of the wage act may result in injunctive relief, damages, treble damages, attorney's fees and costs, and criminal penalties. G.L. c. 149, §§ 27C, 148, 150.

The parties agree that *Leness was* entitled to 15 days (three weeks) annual vacation, and was entitled to accrue and carry over from year to year any unused vacation time. Under his employment agreement, Leness was to receive payment for all earned vacation days regardless of whether he was terminated with or without cause. It is undisputed that EM did not pay Leness any money representing accrued vacation, establishing a violation of the wage act to the extent Leness had accrued but not used vacation.

The company kept track of employees' vacation but did not maintain records for either Chang or Leness because they were officers. Leness calculated that he had accrued 28.8 days of unused vacation as of January 5, 2008 (his last date of employment). He prepared a spreadsheet of vacation taken which he presented to Ginni Stoddard, EM's office manager. Chang and Stoddard examined the spreadsheet in comparison to other company records and. found seven additional days that Leness had taken as vacation. *In* addition, Chang sought to deduct Friday afternoons during the summer months because Leness often left after Friday morning office meetings in the summer to go to a family home on Long Island, and Leness's spreadsheet did.not account for any Fridays during the summers. Leness acknowledged that his wife had prepared a summer "vacation schedule" that listed Fridays off but he testified that the schedule was for

planning purposes only and was not always followed. Nonetheless, he acknowledged leaving work early on some Fridays to get a head start of traffic, and on the weekend, and had done so since 2004.

Assessing all of the evidence presented regarding vacation time, I find that Leness is entitled to compensation for 8.4 days of accrued and unused vacation. Taking the 28.8 days calculated by Leness, less the seven days listed in company records, a resulting subtotal is 21.8 days. Crediting Leness's testimony (in part) that he did not take every Friday afternoon off during the summer months (which would total 40 days from 2004-2007), I will discount one-third of the total number of Fridays, leaving a total of 26.8 days, which I divide in half for the half-day taken, resulting in an additional deduction of 13.4 days. Subtracting this number from the 21.8 day subtotal above, Leness is entitled to compensation for 8.4 days of accrued and unused vacation. Multiplied by a weekly salary of $3,365.38, Leness is entitled to $4,732.10. Under the wage act, this amount must be trebled, totaling $14,196.30. To this is added $3,678 in reasonable attorney's fees.[2]

[2] Attorney James O'Connell has submitted a comprehensive and detailed set of billing records reflecting work performed on the overall case by date, event, and time. O'Connell's legal fees total $275,340.75, of which he attributes $3,365.38 to pursing the wage act violation. This attribution is entirely fair and reasonable and therefore is awarded.

## ORDER FOR JUDGMENT

Judgment shall enter in favor of the defendant Anthony Leness, on plaintiffs claims for breach of contract (Count One), breach of covenant of good faith and fair dealing (Count Two), and breach of fiduciary duty (Count Four). All other counts are hereby DISMISSED.

Judgment shall enter in favor of the defendant/plaintiff-in-counterclaim Anthony Leness on counterclaims for breach of contract (Counterclaim Count One) and breach of covenant of good faith and fair dealing (Counterclaim Count Two). Damages are awarded under these two claims for $155,950 in unpaid severance plus $10,096.15 in vacation pay.

Judgment shall enter in favor of the defendant/plaintiff-in-counterclaim Anthony Leness on his counterclaim for violation of G.L. c. 149, § 148. Damages in the principal amount of $4,732.10 are hereby trebled to total $14,196.30. The Court awards attorneys' fees in the amount of $3,678.00.

Judgment shall enter in favor of the plaintiff/defendant-in-counterclaim EventMonitor, Inc. on defendant's counterclaim for indemnification (Counterclaim Count Three). All other counterclaims are hereby DISMISSED.

The clerk shall calculate statutory interest in accordance with the damages set forth above.

bk .( _____

_lclit'iperior Court

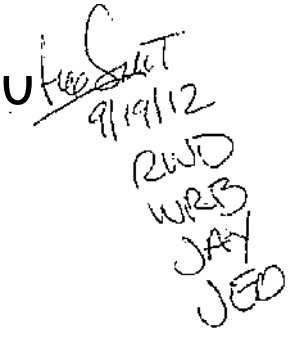
Dated: September 14, 2012

notice sent 09.18.12 (md)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, *ss.*

SUPERIOR COURT
CIVIL ACTION
NO. 08-1950




EVENTMONITOR, INC.,
Plaintiff/Defendant-in-Counterclaim

v.

ANTHONY LENESS,
Defendant/Plaintiff-in-Counterclaim

JUDGMENT

Judgment shall enter in favor of the defendant Anthony Leness, on plaintiff's claims for breach of contract (Count One), breach of covenant of good faith and fair dealing (Count Two), and breach of fiduciary duty (Count Four), All other counts are hereby DISMISSED.

Judgment shall enter in favor of the defendant/plaintiff-in-counterclaim Anthony Leness on counterclaims for breach of contract (Counterclaim Count One) and breach of covenant of good faith and fair dealing (Counterclaim Count Two). Damages are awarded under these two claims for $155,950 in unpaid severance plus $10,096.15 in vacation pay.

Judgment shall enter in favor ofcounterclaim Anthony Leness on his counterclaim for violation of the



defendant/plaintiff-in-

PURSUANT TO THE PROVISIONS OF MASS. . CIV. P. Ws)

AND NOTICE SENT TO PARTIES PLIRS9ANT R T O THE **PRO** -

*t.•:.*K **\.(1630NE OF MASS. R. CO!. P. 770) *AS* FOLLOW;**

MPYV.12 Y pij- meg stv ri *61* 71 1,b,

G.L. c. 149, § 148. Damages in the principal amount of $4,732.10 are hereby trebled to total $14,196.30. The court awards attorneys' fees in the amount of $3,678.00.

Judgment shall enter in favor of the plaintiff/defendant-in-counterclaim EventMonitor, Inc. on defendant's counterclaim for indemnification (Counterclaim Count Three). All other counterclaims are hereby DISMISSED.

By the Court,
Locke, J.

Attest:

Dated: 2.1.6/2012

As#sstant Clerk

COMMONWEALTH OF MASSACHUSETTS THE TRIAL COURT
SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 08- 19501)

SUFFOLK, ss.

EVENTMONITOR, INC.,
Plaintiff,

v.

THONY LENESS,
Defendant.

THONY LENESS,
Plaintiff-in-Counterclaim,

v.

ENTMONITOR, INC., and
ELDON CHANG,
Defendants-in-Counterclaim.

MOTION OF DEFENDANT/PLAINTIFF-1N-COUNTERCLAIM, ANTHONY LENESS, TO ALTER OR AMEND JUDGMENT PURSUANT TO MASS. R. CIV. P. 59(e)

Pursuant to Mass. R. Civ. P. 59(e), Defendant/Plaintiff-in-Counterclaim. Anthony Leness ["Leness"], hereby moves to alter or amend the Judgment entered in his favor on September 19, 12 to (i) include costs as outlined in the attached Exhibits "A" and "B" pursuant to Mass. R. Civ. P., Rules 54(d) and 54(e) and M.G.L. c. 261, §§ I and 13: and (ii) correct the calculation of creed, unused vacation pay awarded to Leness pursuant to M.G.L. c. 149, §§ 148 and ISO.

In support of this Motion, Leness states as follows:

On September 19, 2012, this Court (Locke, J.), entered Judgment ["Judgment"] substantially in Leness' favor following a jury-waived trial, awarding Leness dainai4es in

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**CERTIFICATE OF COMPLIANCE**
**PURSUANT TO RULE 16(K) OF THE**
**MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I, Ronald W. Dunbar, Jr., hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

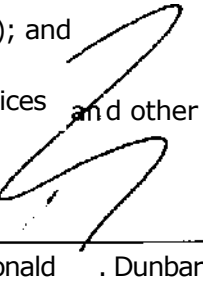
Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations);

Mass. R. A. P. 18 (appendix to the briefs); and

Mass. R. A. P. 20 (form of briefs, appendices and other papers).



Ronald . Dunbar, Jr. BBO#567023
Dunbar
197 Portland Street, Suite
500 Boston, MA 02114

Mass. R. A. P. 16(h) (length of briefs);